

No. 13102

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United States  
Court of Appeals  
for the Ninth Circuit.

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JAMES M. McCLOSKEY, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company, a Corporation, Bankrupt,  
Appellant,  
vs.

DIVISION OF LABOR LAW ENFORCEMENT,  
Department of Industrial Relations, State of California,  
Appellee.

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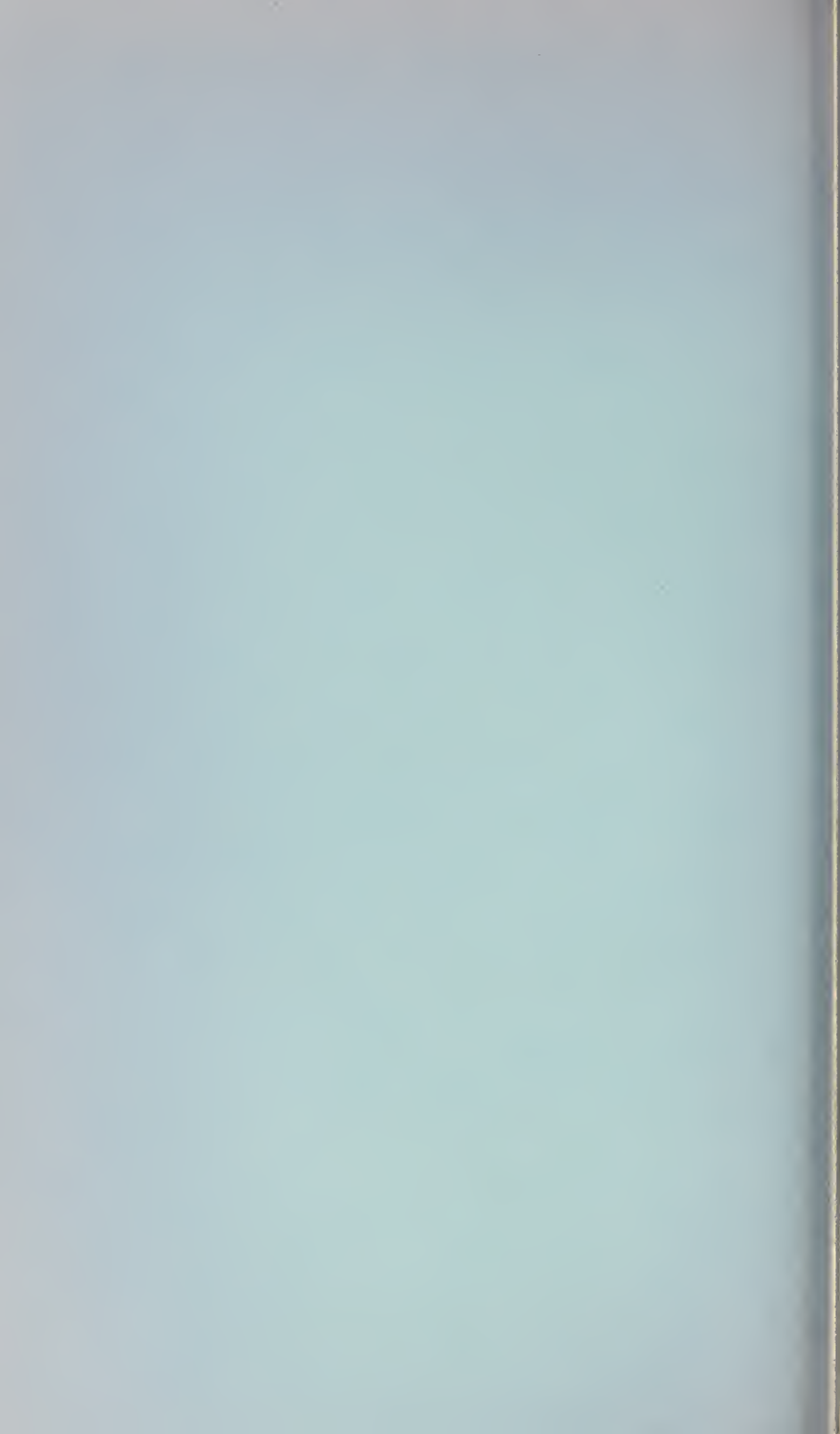
Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.

FILED

MAR - 3 1952



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

CRAIG, WELLER & LAUGHRAN,

C. E. H. McDONNELL,

111 West 7th St.,

Los Angeles, Calif.,

For the Appellant.

PAULINE NIGHTINGALE,

EDWARD M. BELASCO,

LEON H. BERGER,

Attorneys Division of Labor Law Enforcement  
State of Calif.,

503 State Bldg.,

Los Angeles, Calif.,

For the Appellee.





In the District Court of the United States, Southern  
District of California, Central Division

No. 50151

In the Matter of:

ELLIOTT WHOLESALE CO., a California Corporation,

Alleged Bankrupt.

INVOLUNTARY PETITION  
IN BANKRUPTCY

To the Honorable Judges of the United States  
District Court for the Southern District of  
California, Central Division:

The Petition of Purex Corporation, Hunt Foods,  
Inc., and Lever Bros. Co., respectfully represents:

I.

That Elliott Wholesale Co., a California Corporation, has its principal place of business in the City of Santa Barbara, County of Santa Barbara, State of California, within the above judicial district, and has had said principal place of business for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district, and owes debts to the amount of \$1,000.00 and more, and is not a municipal, railroad, insurance or banking corporation, or a building and loan association, but is engaged in the wholesale grocery business.

## II.

That your petitioners are creditors of the said alleged bankrupt, having provable claims amounting in the aggregate in excess of securities held by them in the sum of \$500.00 or more.

## III.

That the nature and amounts of your petitioners' claims are as follows:

That within two years last past, at Los Angeles, California, the alleged bankrupt herein became indebted to Purex Corporation, Ltd., in the sum of \$999.20, for goods, wares and merchandise delivered by the said Purex Corporation, Ltd., to the alleged bankrupt on an open account; that no part thereof has been paid, although payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

That within two years last past, at Los Angeles, California, the alleged bankrupt became indebted to Hunt Foods, Inc., in the sum of \$1,290.02, for goods, wares and merchandise delivered by the said Hunt Foods to the alleged bankrupt on an open account; that no part thereof has been paid, although payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

That within two years last past, at Los Angeles, California, the alleged bankrupt became indebted to Lever Bros Co., in the sum of \$764.17, for goods, wares and merchandise delivered by the said Lever Bros. Co. to the alleged bankrupt upon an open account; that no part thereof has been paid, al-

though payment was duly demanded of the alleged bankrupt prior to the commencement of this action.

#### IV.

That your petitioners further represent that the said alleged bankrupt, Elliott Wholesale Co., did, within the four months next preceding the date of the filing of this petition, commit an act of bankruptcy in that on or about the 3rd day of June, 1950, it made an assignment for the benefit of creditors to F. L. Farrell, of Santa Barbara, California.

Wherefore, your petitioners pray that services of this petition, with subpoena, may be made upon the said alleged bankrupt as provided in the Act of Congress relating to bankruptcy, and that the said alleged bankrupt may be adjudged by this Court to be a bankrupt within the purview of said Act.

PUREX CORPORATION, LTD.,

By /s/ G. A. EVANS,  
Secretary.

HUNT FOODS, INC.,

By /s/ JOSEPH R. HARMON,  
Secretray.

## LEVER BROS. CO.

By /s/ MILTON D. KLEIN,  
Authorized Agent and  
Attorney-in-Fact.

QUITTNER, STUTMAN &  
SHUTAN,

By /s/ JACK STUTMAN,  
Attorneys for Petitioning  
Creditors.

Duly verified.

[Endorsed]: Filed July 21, 1950.

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[Title of District Court and Cause.]

## ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 21st day of July, 1950;

Whereas, a petition was filed in this court on the 21st day of July, 1950, against Elliott Wholesale Co., a corporation, alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to David B. Head, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Elliott Wholesale Co., a corporation, shall henceforth attend before said referee and submit

to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,  
United States District Judge.

[Endorsed]: Filed July 21, 1950.

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[Title of District Court and Cause.]

### ADJUDICATION OF BANKRUPTCY

At Los Angeles, in said District, on the 16th day of August, 1950.

The petition of Purex Corporation, Hunt Foods Inc., and Lever Bros. Co., filed on the 21st day of July, 1950, that Elliott Wholesale Co. be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and the time within which an answer might be filed having expired; and there being no opposing interest;

It is adjudged that the said Elliott Wholesale Co. is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

[Endorsed]: Filed August 17, 1950.



[Title of District Court and Cause.]

### REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

The undersigned, David B. Head, Referee in Bankruptcy, certifies as follows:

Trustee filed objections to the claim filed herein by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, representing an aggregation of the claims of a number of the employees of the bankrupt corporation. I determined that as to that portion of the claim founded upon "severance pay" the objections filed by the trustee must be sustained and held accordingly that the claims for "severance pay" were not entitled to priority under the provisions of Section 1204 of the California Code of Civil Procedure, but should be allowed as a general unsecured claim only. An Order denying priority to that portion of the claim founded upon "severance pay" was entered. From this order the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, has petitioned for review.

Inasmuch as there is no Reporter's Transcript of the proceedings in this matter I shall outline the evidence. Without dispute the evidence shows the following facts: the bankrupt operated a sizable wholesale grocery business in the city of Santa Barbara, California. The employees here claiming sev-

erance pay were employed under a union contract which was in effect up to the date of termination of business. Article 3, Section 5 of the said union contract provided as follows:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

On June 2nd, 1950, the bankrupt corporation made a general assignment for benefit of creditors. On July 21, 1950, the within bankruptcy proceedings were commenced by the filing of an involuntary petition in bankruptcy. The Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed a claim in these proceedings which included the claims of the following persons for “severance pay”:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	4.15
Elbert W. Whitney.....	84.60
James F. Bond.....	74.50
Mario Pezzati.....	68.50

All of the said employees were discharged because of the cessation of the operations by the bankrupt corporation shortly prior to the assignment for benefit of creditors. None of the claimants resigned or quit their jobs, nor were any of them discharged for dishonesty, drinking on the job or gross insubordination.

None of those individuals claiming severance pay received either one week's notice of their discharge or in lieu thereof one week's "severance pay."

The Division of Labor Law Enforcement, Department of Industrial Relations, State of California, contended before me that the claims for severance pay were entitled to priority under Section 1204 of the California Code of Civil Procedure. Counsel for the trustee argued that these provisions for severance pay were actually provisions for liquidated damages and therefore did not fall within a provision of California Code of Civil Procedure Section 1204 which grants a priority for "wages and salaries \* \* \* for personal services rendered." I agreed with the latter contention and accordingly found as indicated hereinbefore.

The question presented by this review is:

Does Section 1204 of the California Code of Civil Procedure grant priority of payment to "severance pay" provided for in an employment contract?

I further certify the following papers from the file:

(1) Objections of the Trustee to Claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(2) Original claim filed in the within proceedings by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(3) Amended Claim filed in the within proceedings by the Division of Labor Law En-



forcement, Department of Industrial Relations, State of California.

(4) Findings of Fact, and Conclusions of Law.

(5) Order on Trustee's Objection to the claims of Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

(6) Petition for Review.

Dated June 15, 1951.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

[Title of District Court and Cause.]

PROOF OF DEBT IN BANKRUPTCY  
TO CLAIM STATUTORY LIEN

At Santa Barbara, in said District of California, on the 19th day of October, 1950, came R. Lee Ste. Fleure, as Deputy of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, of Santa Barbara, in the County of Santa Barbara, in said District of California, and made oath and said:

That Elliott Wholesale Co., a Corporation (against, by) whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Division in the sum of Five Hun-

dred Eighty and 39/100ths Dollars (\$580.39); that the consideration of said debt is as follows:

Wages earned by the persons listed in the attached exhibit, marked "Exhibit A," which is hereby referred to and made a part hereof as if here set forth in full; and that all of the said persons listed in said exhibit have duly assigned in writing their said claims and statutory liens for labor and services to the Chief of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, to collect under the authority vested in him by the laws of said State; that John F. Dalton is the duly appointed, qualified, and acting Chief of said Division, and that under and by virtue of the laws of said State, affiant is the duly authorized person to act for and on behalf of the said John F. Dalton and to file this claim; that said Division is now the sole owner and holder of said claims and liens; that no part of said sum of \$580.39 has been paid; that there are no setoffs nor counterclaims to the same; and deponent further says that no note has been received for such account nor any judgment rendered thereon.

Deponent claims a statutory lien herein on property and funds transferred or to be transferred by the assignee for the benefit of creditors to the trustee herein; and in connection with his claim for a statutory lien, recites that on or about June 2nd, 1950, said bankrupt assigned his business to F. L. Farrell, as assignee for the benefit of creditors; that all of the claims of the assignors of said Division

of Labor Law Enforcement are claims for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that under Section 1204 of the Code of Civil Procedure of the State of California, said claims are preferred claims and liens, and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that preferred claims and liens were filed, as provided by law, by all of said assignors with said assignee for the benefit of creditors; that said assignee had charge of the assets of said bankrupt received by said assignee prior to the filing of the petition in bankruptcy herein, out of which funds said Division's assignors were entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed to the trustee herein, under the laws of the State of California, and of the United States, for the claims of all of the assignors of said Division on Labor Law Enforcement.

/s/ R. LEE STE. FLEURE,  
Deputy, Santa Barbara Office, Division of Labor  
Law Enforcement Department of Industrial  
Relations, State of California.

Subscribed and sworn to before me this 19th day  
of October, 1950.

J. E. LEWIS,  
County Clerk,

[Seal] By /s/ F. G. BAKER,  
Deputy Clerk.

## EXHIBIT "A"

Name:	Nature of Work	Dates Worked 1950	No. of Months	Rate per Month or Week	Amount Due
Vincent L. Nicoletti.....	Warehouse manager	3/2 to 5/26	2-26/31sts mos.	\$270.00 mo.	\$62.37
Alec W. Robinson.....	Route salesman	3/2 to 5/26	2-26/31sts mos.	74.50 per week	40.98
Minna Wilcox .....	Bookkeeper	3/2 to 6/2	3 months	260.00 mo.	32.50
Leo P. Jensen .....	Driver-salesman	3/2 to 6/1	3 months	74.50 per week	40.98
Bert G. Donaldson.....	Manager	3/2 to 6/1	3 months	400.00 mo.	200.00
Ronald A. Grell .....	Route supervisor	3/2 to 5/26	2-26/31sts mos.	84.50 per week	42.25
Elton N. Keller .....	Salesman	3/2 to 5/26	2-26/31sts mos.	68.50 per week	51.38
Elbert W. Whitney....	Warehouse foreman	3/2 to 6/2	3 months	1.76 1/4 per hour	35.20
James F. Bond .....	Driver-salesman	3/2 to 5/29	2-29/31sts mos.	74.50 per week	40.98
Mario Pezzati .....	Truck-driver	3/2 to 5/19	2-17/31sts mos.	1.14 1/4 per hour	33.75
Total .....					<u>\$580.39</u>

[Endorsed]: Filed October 2, 1950, Referee.

In the Matter of the Assignment for the Benefit of Creditors of the Elliott Wholesale Company, a Corporation, of Santa Barbara, County of Santa Barbara, State of California.

Labor Commissioner's No. 18315M

**NOTICE OF PREFERRED LABOR CLAIM**

C.C.P., Sec. 1206

To F. L. Farrell, Assignee for the Benefit of Creditors of the Elliott Wholesale Company, a Corporation;

You Will Take Notice that the claimants hereinafter named performed work and rendered services for the said Assignor within ninety days prior to the Assignment for the Benefit of Creditors of The Elliott Wholesale Company, a Corporation, of the nature indicated below, between the dates indicated, both dates inclusive, at the rate stated and for the time stated, and earned in the said period the sum indicated, no part of which has been paid and the whole of which still remains due, owing and unpaid:



Name of Claimant	Nature of Work	Dates Worked 1950	No. of Months	Rate per Month or Week	Amount Due
Vincent L. Nicoletti..	Warehouse manager	3/2 to 5/26	2-26/31sts mos.	\$270.00 mo.	\$62.37
Alec W. Robinson.....	Route salesman	3/2 to 5/26	2-26/31sts mos.	74.50 per week	40.98
Minna Wilcox .....	Bookkeeper	3/2 to 6/2	3 months	260.00 mo.	32.50
Leo P. Jensen .....	Driver-salesman	3/2 to 6/1	3 months	74.50 per week	40.98
Bert G. Donaldson....	Manager	3/2 to 6/1	3 months	400.00 mo.	200.00
Ronald A. Grell .....	Route supervisor	3/2 to 5/26	2-26/31sts mos.	84.50 per week	42.25
Elton N. Keller .....	Salesman	3/2 to 5/26	2-26/31sts mos.	68.50 per week	51.38
Elbert W. Whitney....	Warehouse foreman	3/2 to 6/2	3 months	1.76 $\frac{1}{4}$ per hour	35.20
James F. Bond .....	Driver-salesman	3/2 to 5/29	2-29/31sts mos.	74.50 per week	40.98
Mario Pezzati .....	Truck-driver	3/2 to 5/19	2-17/31sts mos.	1.41 $\frac{1}{4}$ per hour	33.75
Total .....					<u>\$580.39</u>

That the said claims have been assigned to the State Labor Commissioner for collection, and that he is now sole owner and holder thereof; that the facts regarding said claims have been investigated by the State Labor Commissioner and found to support the claims.

This therefore is to demand that you, the said Assignee for the Benefit of Creditors, etc., shall under and pursuant to the provisions of Section 1204 of the Code of Civil Procedure, State of California, pay to the undersigned the amount set forth above as a preferred labor claim.

JOHN F. DALTON,

State Labor Commissioner,

By /s/ R. LEE STE. FLEURE,

Deputy Labor Commissioner.

State of California,

County of Santa Barbara—ss.

R. Lee Ste. Fleure, being first duly sworn, deposes and says: That he is a duly appointed, authorized, and acting Deputy of the State Labor Commissioner; that he has read the foregoing Notice of Preferred Labor Claim and knows the contents thereof, and that the statements contained therein are true of his knowledge, except those statements based upon information and belief, and as to those matters he believes them to be true.

/s/ R. LEE STE. FLEURE,

Deputy Labor Commissioner.

Subscribed and sworn to before me this 27th day of July, 1950.

J. E. LEWIS,  
County Clerk,

[Seal] By /s/ F. G. BAKER,  
Deputy Clerk.

Affidavit of service of copy of claim attached.

[Endorsed]: Filed October 23, 1950, Referee.

[Title of District Court and Cause.]

### OBJECTIONS TO CLAIMS AND NOTICE OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

Division of Labor Law Enforcement,  
Santa Barbara, California.

#80 \$580.39

Trustee objects to the allowance of the above-captioned claim, which aggregates a number of labor claims, on the grounds that it is insufficiently itemized to enable the Trustee to check the precise times during which the claimed wages were earned. Trustee further objects to the allowance of the claims of Vincent Nicoletti in the amount of \$62.37, that of Bert G. Donaldson in the amount of \$200.00, Ronald A. Grell in the amount of \$42.25, and Elbert



W. Whitney in the amount of \$35.20 as prior claims on the grounds that said employees were supervisory employees and hence are not entitled to priority under the provisions of the bankruptcy act. Trustee accordingly alleges that whatever sums are allowed for the hereinbefore specifically set out claimants should be allowed as general unsecured claims only.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ JAMES M. McCLOSKEY,  
Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable David B. Head, Referee in Bankruptcy, in the City Hall Building, Santa Barbara, California, on the 4th day of May, 1951, at the hour of 10 o'clock A.M.

Dated April 10, 1951.

CRAIG, WELLER &  
LAUGHARN,

By /s/ C. E. H. McDONNELL,  
Attorneys for Trustee.

[Endorsed]: Filed April 19, 1951, Referee.

[Title of District Court and Cause.]

AMENDED PROOF OF DEBT IN BANK-  
RUPTCY TO CLAIM STATUTORY LIEN

At Santa Barbara, in said District of California, on the 23rd day of April, 1951, came R. Lee Ste. Fleure, as Deputy of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, of Santa Barbara, in the County of Santa Barbara, in said District of California, and made oath and said:

That he, in his official capacity as Deputy of said Division of Labor Law Enforcement, etcetera, prepared and filed on October 23rd, 1950, a Proof of Debt in Bankruptcy to Claim Statutory Lien; that since the filing of said proof of debt affiant has received information which requires the correction of certain portions of said proof of debt; that this Amended Proof of Debt in Bankruptcy to Claim Statutory Lien, together with affiant's Amended Proof of Unsecured Debt in Bankruptcy (General), being filed concurrently herewith, are in place and instead of the aforesaid claim heretofore filed on October 23rd, 1950.

That Elliott Wholesale Co., a Corporation, against whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said Division in the sum of Nine Hundred Eighty Three and 56/100ths Dollars (\$983.56); that the consideration of said debt is as follows:

Wages earned by the persons listed in the at-

tached exhibit, marked "Exhibit A," which is hereby referred to and made a part hereof as if here set forth in full; and that all of the persons listed in said exhibit have duly assigned in writing their said claims and statutory liens for labor and services to the Chief of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California to collect under the authority vested in him by the laws of said State; that John F. Dalton is the duly appointed, qualified and acting Chief of said Division, and that under and by virtue of the laws of said State affiant is the duly authorized person to act for and on behalf of said John F. Dalton and to file this claim; that said Division is now the sole owner and holder of said claims and liens; that no part of said sum of Nine Hundred Eighty Three and 56/100ths Dollars (\$983.56) has been paid; that there are no set-offs nor counterclaims to the same; and deponent further says that no note has been received for such account nor any judgment rendered thereon.

Deponent claims a statutory lien herein on property and funds transferred or to be transferred by the assignee for the benefit of creditors to the trustee herein; and in connection with his claim for a statutory lien recites that on or about June 2nd, 1950, said bankrupt assigned his business to F. L. Farrell, as assignee for the benefit of creditors; that all the claims of the assignors of said Division of Labor Law Enforcement are claims for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that

under Section 1204 of the California Code of Civil Procedure said claims are preferred claims and liens and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that preferred claims and liens were filed, as provided by law, by all of said assignors with said assignee for the benefit of creditors; that said assignee had charge of the assets of said bankrupt prior to the filing of the petition in bankruptcy herein, out of which funds said Division's assignors were entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed, or to be passed, to the trustee herein, under the laws of the State of California and of the United States, for the claims of all the assignors of said Division of Labor Law Enforcement.

/s/ R. LEE STE. FLEURE,  
Deputy, Division of Labor Law Enforcement, Department of Industrial Relations, State of California.

Subscribed and sworn to before me this 23rd day of April, 1951.

J. E. LEWIS,  
County Clerk.

[Seal] By /s/ L. R. HEAD,  
Deputy Clerk.



EXHIBIT "A"

Name and Occupation	Date of Termination	Vacation Pay (one fourth)	Severance Pay	Regular Wages	Total Statutory Lien
Vincent L. Nicoletti, Warehouse manager.....	5/26/50	\$16.87			\$ 16.87
Alec W. Robinson, Route salesman .....	5/26/50	52.15	\$74.50		126.65
Minna Wilcox Bookkeeper .....	6/ 2/50	30.02			30.02
Leo P. Jensen, Driver-salesman .....	6/ 1/50	37.25	74.50		111.75
Bert G. Donaldson, manager, wholesale grocery .....	6/ 1/50			\$200.00	200.00
Ronald A. Grell, Route supervisor .....	5/26/50	42.25	84.50		126.75
Elton N. Keller, Salesman .....	5/26/50	51.38			51.38
Elbert W. Whitney, Warehouse foreman .....	6/ 2/50	35.20	84.60		119.80
James F. Bond, Driver-salesman .....	5/29/50	37.25	74.50		111.75
Mario Pezzati, Truck driver .....	5/19/50	33.75	54.84		88.59
Total .....					<u>\$983.56</u>

[Endorsed]: Filed April 24, 1951, Referee.

[Title of District Court and Cause.]

# FINDINGS OF FACT, CONCLUSIONS OF LAW ON OBJECTIONS TO CLAIMS OF DIVISION OF LABOR LAW ENFORCE- MENT

This matter having come on for hearing on the verified objections to claims of James M. McCloskey, trustee herein, on the 4th day of May, 1951, at the hour of 10:00 A.M. thereof, and the trustee having appeared by and been represented through his

counsel, Craig, Weller & Laugharn, by C. E. H. McDonnell and the Division of Labor Law Enforcement, Department of Industrial Relations, State of California having appeared through and been represented by Pauline Nightingale, Edward M. Belasco, and Leon H. Berger, by Leon H. Berger, and evidence both oral and documentary having been offered, the Referee being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law, on the said objections:

### Findings of Fact

#### I.

The Referee finds that the Elliott Wholesale Grocery Company, a Corporation, made a general assignment for benefit of creditors on June 2, 1950; that an involuntary petition in bankruptcy was filed against the said Elliott Wholesale Grocery Company on July 21, 1950, and that thereafter the said Elliott Wholesale Grocery Company was adjudicated a bankrupt; that on September 8, 1950, James M. McCloskey was elected Trustee in bankruptcy for the Elliott Wholesale Grocery Company, a bankrupt, immediately filed his bond and qualified; that from and after qualification the said James M. McCloskey has continued at all times, and does now, act as trustee in the said bankruptcy.

#### II.

The Referee finds that on October 23, 1950, the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed a

claim in the bankruptcy proceedings of the Elliott Wholesale Grocery Company on behalf of a number of persons who claimed rights as employees of the bankrupt corporation; that such claims were aggregated into a single claim for \$580.39; that thereafter on April 24, 1951, the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, filed an "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" on behalf of the same claimants, aggregating their claims into a single claim for \$983.56; that all of the said claims were asserted to be entitled to priority under the Provisions of Sec. 1204 of the California Code of Civil Procedure; that of the claim so filed \$447.34 was asserted due as "severance pay."

### III.

The Referee finds that on April 10, 1951, the trustee, James M. McCloskey, filed objections to the original claims filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, which objections came on for hearing on May 4, 1951, at the hour of 10:00 A.M.; that at that time the objections filed by the Trustee were, by Stipulation, applied to and allowed to stand against the "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" filed by the Division of Labor Law Enforcement in the interim.

### IV.

The Referee finds that the following persons are claiming the indicated sums as "severance pay":

Alec W. Robinson, \$74.50; Leo P. Jensen, \$74.50; Ronald A. Grell, \$84.15; Elbert W. Whitney, \$84.60; James F. Bond, \$74.50; Mario Pezzati, \$68.50; that all of these claims are aggregated in "Amended Proof of Debt in Bankruptcy to Claims Statutory Lien" filed by the Division of Labor Law Enforcement and that priority under Section 1204 of the California Code of Civil Procedure is asserted for all such "severance pay" claims.

## V.

The Referee finds that the following claimants were employed by the Bankrupt Corporation until the dates of their discharge which are as follows: Alec W. Robinson, May 26, 1950; Leo P. Jensen, June 1, 1950; Ronald R. Grell, May 26, 1950; Elbert W. Whitney, June 2, 1950; James F. Bond, May 29, 1950; Mario Pezzati, May 19, 1950; that all of these claimants were discharged because of the cessation of operations by the bankrupt corporation shortly prior to the assignment for benefit of creditors; that none of these claimants resigned or quit their jobs with the bankrupt corporation; that none of these claimants were discharged for dishonesty, drinking on the job, or gross insubordination; that none of these claimants received either one week's notice of their discharge or in lieu thereof one week's "severance pay."

## VI.

The Referee finds that all employees claiming severance pay were employed under a union con-



tract between the bankrupt corporation and a union to which all claiming employees belonged; that the said contract was in effect up to the date of the assignment for benefit of creditors by the bankrupt corporation; that Article 3, Section 5, of the said Union Contract provided as follows:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

## Conclusions of Law

### I.

That there was a valid, existing contract between the bankrupt corporation and the labor union to which its employees belonged in existence to June 2, 1950; that said contract required payment of one week’s “severance pay” when employees covered thereby were discharged or laid off for other reasons than dishonesty, drinking on the job or gross insubordination.

### II.

That the bankrupt corporation became indebted for one week’s “severance pay” to its employees when it laid them off without notice because of cessation of business operation.

### III.

That the indebtedness of the bankrupt corporation to its employees for one week’s “severance

pay” was in the nature of liquidated damages for breach of the employment contract; that the indebtedness for “severance pay” is not for “wages and salaries” \* \* \* “for personal services rendered” and is not entitled to a preferred position under the provisions of Section 1204 of the California Code of Civil Procedure.

Dated May 18, 1951.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

Received May 10, 1951, Referee.

[Endorsed]: Filed May 18, 1951, Referee.

[Title of District Court and Cause.]

### ORDER ON OBJECTION TO CLAIM

This matter having come on for hearing on the verified objection to claim of James M. McCloskey, the trustee herein on the 4th day of May, 1951, at the hour of 10:00 a.m. thereof, and the trustee having appeared through and been represented by his counsel Craig, Weller & Laugharn by C. E. H. McDonnell, and the Division of Labor Law Enforcement, Department of Industrial Relations, State of California having appeared through and been represented by its counsel Pauline Nightingale, Edward M. Belasco, and Leon H. Berger, by Leon H. Berger, and it appearing that the original claim filed by the Division of Labor Law Enforcement,

bearing court number 80, in the amount of \$580.39 had been amended by the filing of another claim covering the same labor claimant, by the Division of Labor Law Enforcement in a total amount of \$983.56, and it further appearing that in addition to the claim in the amount of \$983.56, for which labor priority is asserted, that the Division of Labor Law Enforcement had also filed on behalf of a number of the labor claimants involved in the objection of the Trustee here a general unsecured claim for which no priority was asserted, and it being determined that nothing in the orders made here by the Referee would affect or alter the said general unsecured claim filed by the Division of Labor Law Enforcement, and that any general unsecured portion of the statutory lien claim would attach to and be in addition to any unsecured sums claimed otherwise in other claims, and evidence both oral and documentary having been offered, and the Referee having duly made his Findings of Fact and Conclusions of Law concerning the rights asserted by a number of the labor claimants involved in the general claim filed by the Division of Labor Law Enforcement to "severance pay," and based on the said Findings of Fact and Conclusions of Law so far as these orders affect severance pay priority, and the Referee being fully advised in the premises

Now, Therefore,

It Is Ordered that the claim of Vincent L. Nicoletti, in the amount of \$16.87 which is a portion of the hereinbefore described total claim of the Division of Labor Law Enforcement be and the same hereby

is allowed as a claim entitled to priority under C.C.P. 1204 and

It Is Further Ordered that the claim filed through the Division of Labor Law Enforcement by Alec W. Robinson in the amount of \$128.65 be and the same hereby is allowed in the sum and to the amount of \$52.15 as a statutory lien claim under C.C.P. 1204, and to the amount of \$74.50, which is severance pay, as a general unsecured claim and

It Is Further Ordered that the claim filed by Minna Wilcox through the Division of Labor Law Enforcement be and the same hereby is allowed in the sum of \$30.02 as a statutory lien claim under the provisions of C.C.P. 1204 and

It Is Further Ordered that the claim filed by Leo P. Jensen with the Division of Labor Law Enforcement, which is embodied in their total claim as said here before, be and the same hereby is allowed in the amount and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay; and

It Is Further Ordered that the claim filed by Bert G. Donaldson with the Division of Labor Law Enforcement, and which is embodied in their priority claim as aforesaid be and the same hereby is allowed in the amount and to the extent of \$200.00 as a general unsecured claim; and

It Is Further Ordered that the claim filed by Ronald A. Grell with the Division of Labor Law Enforcement and which is embodied in their summary claim as set forth above be and the same



hereby is allowed in the amount and to the extent of \$42.25 as a claim entitled to priority under C.C.P. 1204, and to the amount of \$84.50 as a general unsecured claim for severance pay, and

It Is Further Ordered that the claim filed herein by Elton N. Keller with the Division of Labor Law Enforcement and which is embodied in their summary claim as said before, be and the same hereby is allowed in the amount of and to the extent of \$51.38 as a claim entitled to priority under C.C.P. 1204; and

It is Further Ordered that the claim filed by Elbert W. Whitney in the amount of \$119.80 with the Division of Labor Law Enforcement, and which is embodied in the summary claim of the Division of Labor Law Enforcement as said before be and the same hereby is allowed in the amount and to the extent of \$35.20 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$70.50 as a general unsecured claim for severance pay; and

It Is Further Ordered that the claim filed by James F. Bond with the Division of Labor Law Enforcement in the amount of \$111.75, and which is embodied in the said summary claim of the Division of Labor Law Enforcement, be and the same hereby is allowed in the amount of and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204 and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay and

It is Further Ordered that the claim filed herein by Mario Pezzati with the Division of Labor Law

Enforcement in the amount of \$88.59, and which is a portion of the summary claim filed by the Division of Labor Law Enforcement in the within proceedings as aforesaid, be and the same hereby is allowed in the amount and to the extent of \$33.75 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$68.50 as a general unsecured claim for severance pay.

Dated May 17, 1951.

/s/ DAVID B. HEAD,  
Referee in Bankruptcy.

[Endorsed]: Filed May 17, 1951.

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[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S  
ORDER DENYING STATUTORY LIEN  
CLAIM UNDER SECTION 67-b OF THE  
BANKRUPTCY ACT

Comes now the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, by and through its attorneys, Pauline Nightingale, Edward M. Belasco and Leon H. Berger, by Leon H. Berger, and files this, its petition for review of those certain orders made and entered on May 17, 1951, by Honorable David B. Head, Referee in Bankruptcy, wherein said referee ordered that the objections of James M. McCloskey, trustee in bankruptcy herein, to the statutory lien

claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, be sustained with respect to \$74.50 of the assigned statutory lien claim of Alec W. Robinson; \$74.50 of the assigned statutory lien claim of Leo P. Jensen; \$84.50 of the assigned statutory lien claim of Ronald A. Grell; \$70.50 of the assigned statutory lien claim of Elbert W. Whitney; \$74.50 of the assigned statutory lien claim of James F. Bond; and \$68.50 of the assigned statutory lien claim of Mario Pezzati, each of which was a claim for severance pay, and ordered each of said claims be allowed only as general unsecured claims.

With respect to the foregoing, on or about May 17, 1951, The Honorable David B. Head, Referee in Bankruptcy, signed his Findings of Fact and Conclusions of Law in the above-entitled matter, and thereupon on said date made and entered his Order on the objection of the trustee to the claim of the petitioner, said order reading in part as follows:

“It Is Further Ordered that the claim filed through the Division of Labor Law Enforcement by Alec W. Robinson in the amount of \$128.65 be and the same hereby is allowed in the sum and to the amount of \$52.15 as a statutory lien claim under C.C.P. 1204, and to the amount of \$74.50, which is severance pay, as a general unsecured claim and

“It Is Further Ordered that the claim filed by Leo P. Jensen with the Division of Labor Law Enforcement, which is embodied in their total claim as said here before, be and the

same hereby is allowed in the amount and to the extent of \$37.25 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$74.50, as a general unsecured claim for severance pay; and

“It Is Further Ordered that the claim filed by Ronald A. Grell with the Division of Labor Law Enforcement and which is embodied in their summary claim as set forth above be and the same hereby is allowed in the amount and to the extent of \$42.25 as a claim entitled to priority under C.C.P. 1204, and to the amount of \$84.50 as a general unsecured claim for severance pay, and

“It Is Further Ordered that the claim filed by Elbert W. Whitney in the amount of \$119.80 with the Division of Labor Law Enforcement, and which is embodied in the summary claim of the Division of Labor Law Enforcement as said before be and the same hereby is allowed in the amount and to the extent of \$35.20 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$70.50 as a general unsecured claim for severance pay; and

“It Is Further Ordered that claim filed by James F. Bond with the Division of Labor Law Enforcement in the amount of \$111.75, and which is embodied in the said summary claim of the Division of Labor Law Enforcement, be and the same hereby is allowed in the amount of and to the extent of \$37.25 as a claim



entitled to priority under C.C.P. 1204 and in the amount and to the extent of \$74.50 as a general unsecured claim for severance pay, and

“It Is Further Ordered that the claim filed herein by Mario Pezzati with the Division of Labor Law Enforcement in the amount of \$88.59, and which is a portion of the summary claim filed by the Division of Labor Law Enforcement in the within proceedings as aforesaid, be and the same hereby is allowed in the amount and to the extent of \$33.75 as a claim entitled to priority under C.C.P. 1204, and in the amount and to the extent of \$68.50 as a general unsecured claim for severance pay.

“Dated May 17, 1951.

“/s/ DAVID B. HEAD,

“Referee in Bankruptcy.”

That the foregoing orders were based upon the Findings of Fact and Conclusions of Law of the Referee heretofore made and entered by him in this proceeding and this Petition for Review is based upon the following grounds and errors with respect to the orders set forth above:

### I.

That the Referee in Bankruptcy erred in ordering that the objections of the Trustee be sustained to the statutory lien claim for severance pay of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, as assignee of Alec W. Robinson to the extent of

\$74.50; as assignee of Leo P. Jensen to the extent of \$74.50; as assignee of Ronald A. Grell to the extent of \$84.50; as assignee of Elbert W. Whitney to the extent of \$70.50; as assignee of James F. Bond to the extent of \$74.50; and as assignee of Mario Pezzati to the extent of \$68.50.

## II.

That the Referee in Bankruptcy erred in ordering that the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California does not have a statutory lien under Section 67 (b) of the Bankruptcy Act with respect to severance pay due to its assignors and in ordering that said claims be allowed only as general unsecured claims.

## III.

That the Referee in Bankruptcy erred in basing his orders upon a conclusion of law "that the indebtedness of the bankrupt corporation to its employees for one week's 'severance pay' was in the nature of liquidated damages for breach of the employment contract; that the indebtedness for 'severance pay,' is not for 'wages and salaries \* \* \* for personal services rendered' and is not entitled to a preferred position under the provisions of Section 1204 of the California Code of Civil Procedure."

## IV.

That the Referee in Bankruptcy erred in basing his orders upon a conclusion of law that severance

pay provided for in a union contract reading as follows,

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

did not, where the employees were discharged and the notice by the employer was not given, constitute wages or salary entitled to priority under the provisions of Section 1204 of the Code of Civil Procedure of the State of California.

## V.

That the Referee in Bankruptcy erred in making his orders in that he did not conclude as a matter of law that severance pay, becoming due and payable under the terms of a collective bargaining contract within ninety (90) days prior to an assignment for the benefit of creditors, constituted wages for personal services within the provisions of Section 1204 of the Code of Civil Procedure of the State of California and entitled to a lien thereunder.

Wherefore, your petitioner prays that the said orders be reviewed and reversed, and that the Referee be directed to make and enter his orders allowing as statutory lien claims the claims for severance pay of the Division of Labor Law Enforcement of the Department of Industrial Relations of the State of California, and for such other

and further relief, decrees and orders as the Court may deem proper.

Dated May 25, 1951.

PAULINE NIGHTINGALE,  
EDWARD M. BELASCO, and  
LEON H. BERGER,

By /s/ LEON H. BERGER,  
Attorneys for Petitioner, Division of Labor Law  
Enforcement, Etc.

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[Title of District Court and Cause.]

### AFFIDAVIT OF SERVICE BY MAIL

Gladys Duncan, being first duly sworn, says that affiant is a citizen of the United States and a resident of this County, is over 18 years of age and not a party to the above-entitled matter, and that affiant's business address is 503 Calif. State Bldg., 217 W. 1st St., Los Angeles 12, California;

That on May 28, 1951, affiant served a copy of the attached Petition for Review of Referee's Order Denying Statutory Lien Claim Under Section 67-b of the Bankruptcy Act on the following named persons by placing a true copy of said papers in a sealed envelope with postage fully prepaid, and depositing the envelope in the United States mail in the post office of this City addressed to the last known address, to which there is regular daily communication by mail, as follows: Craig, Weller &

Laugharn, and John K. Hass, Attorneys for Trustee,  
111 West 7th Street, Room 817, Los Angeles 14,  
California.

/s/ GLADYS DUNCAN.

Subscribed and sworn to before me this 28th day  
of May, 1951.

[Seal] /s/ MARGUERITE REESE,  
Notary Public In and for the County of Los An-  
geles, State of California.

My commission expires June 15, 1951.

[Endorsed]: Filed May 28, 1951, Referee.

[Endorsed]: Filed June 15, 1951, U.S.D.C.

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[Title of District Court and Cause.]

### MEMORANDUM DECISION

#### Appearances:

For the Petitioner:

PAULINE NIGHTINGALE,  
EDWARD M. BELASCO,  
LEON H. BERGER.

For the Trustee:

CRAIG, WELLER & LAUGHRAN,  
C. E. H. McDONNELL.

Yankwich, District Judge:

The petition to review the Order of the Referee,  
dated May 17, 1951, denying priority for severance



pay due to certain employees of the bankrupt, heretofore heard, argued and submitted, is now decided as follows:

The Order of the Referee dated May 17, 1951, is hereby reversed and the Referee is directed to allow the rejected claims as a preferred claim for wages, as follows:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	84.50
Elbert W. Whitney.....	70.50
James F. Bond.....	74.50
Mario Pezzati.....	68.50

### Comment

An involuntary petition was filed against Elliott Wholesale Grocery Company of Santa Barbara, California on July 21, 1950. An adjudication was made on September 8, 1950. Prior to that time, however, on June 2, 1950, the bankrupt made a general assignment for the benefit of creditors. In the bankruptcy proceedings, six employees, represented by the Division of Law Enforcement, Department of Industrial Relations of the State of California, claimed severance pay. The discharge dates were within the ninety-day period from the date of the general assignment, the earliest date being May 19, 1950. The discharge resulted from the assignment, and not by reason of any misconduct of any of the employees.

In the contract between the bankrupt and the

union to which the employees belonged, it was provided:

“Except for dishonesty, drinking on the job, or gross insubordination, the employer shall give one week’s notice or one week’s pay in lieu thereof when discharging or laying off an employee. Employees desiring to quit their job shall give the employer one week’s notice.”

No such notice was given to any of the employees.

A preferred claim status was claimed both under the Bankruptcy Act (11 U.S.C.A., Sec. 107 (4) (b)) and Section 1204 of the Code of Civil Procedure of California, which gives a preferred status to wages earned within ninety days prior to assignment of creditors. The Referee disallowed the claim. He took the view, expressed in his certificate, that the contract provisions for severance pay did not come within the purview of Section 1204 of the California Code of Civil Procedure, which granted priority to “wages or salaries \* \* \* for personal services rendered” within the ninety-day period, because they were “actually provisions for liquidated damages.”

The Referee erred in this interpretation. The provision in the contract clearly indicates that the severance pay is in lieu of wages. In effect, it says that the employee shall be entitled to a week’s notice of discharge. When such notice is not given, or cannot be given because, as happened here, the employer ceased business when it made the assignment for the benefit of its creditors, the employee

is entitled to the week's wages corresponding to the week's notice. (See, *Gapar v. United Milk Products of California*, 1944, 62 C.A. (2) 540.) This provision is in line with the policy of the law of California, which assures to the employee immediate payment of wages upon discharge. (California Labor Code, Section 201.) Even an employee who quits must receive his wages not later than 72 hours after quitting. If he gives the 72 hours' notice, then he is entitled to his wages at the time of the quitting. (California Labor Code, Sec. 202.)

Provisions of this character, whether they call for wages or discharge without notice, or for payment for earned vacation periods, are generally considered wages—that is, compensation for services rendered, which, through no fault of the employee, he was not permitted to render. (See, *In re Dexter*, 1907, 1 Cir., 158 Fed. 788; *In re Collin*, 1937, D.C. N.Y., 18 F. Supp. 848; *In re Herbert Candy Company*, 1942, D.C. Pa., 43 F. Supp. 588, which treats the commissions paid to traveling salesmen as wages entitled to priority under the Bankruptcy Act.)

The vacation pay cases are very helpful. As Judge August N. Hand said:

“A vacation with pay is in effect additional wages. It involves a reasonable arrangement to secure the well being of employees and the continuance of harmonious relations between employer and employee. The consideration for the contract to pay for a week's vacation had been furnished, that is to say, one year's service had been rendered prior to June 1, so that the

week's vacation with pay was completely earned and only the time of receiving it was postponed. If the employer had discharged the employee wrongfully after the latter had done the work necessary to earn a vacation he could not be deprived of the benefits due him." (In re Willow Cafeterias, Inc., 1940, 2 Cir., 111 F (2) 420, 432.) (Emphasis added.)

(And see, Siaskiewicz v. General Electric Co., 1948, 2 Cir., 166 F (2) 463, 465-466; McLaughlin v. Union Switch & Signal Company, 1948, 3 Cir., 166 F (2) 46, 50.)

In *Re Public Ledger*, 1947, 3 Cir., 161 F (2) 762, 770, in an opinion written by Judge Albert Lee Stephens of this Circuit, "severance pay" is denominated wages. We quote from the opinion:

"The claims under the layoff provision of the contract are for wages. The provision protects against a sudden, unexpected and unprepared for stoppage of wages. It provides that knowledge of a break in the continuity of work and the consequent lack of pay shall be given the employee and it is the employer's duty to give it. If he does not give it, the wage continues unaffected for the term of the required notice. Whether the layoff occurs through bankruptcy or any other cause does not affect the validity of this wage requirement. For the lack of a better term, we call this contractual arrangement one for severance pay." (Emphasis added.)



These rulings also find support in the income tax cases which consider severance pay additional compensation. (See, 1 Mertens, Law of Federal Income Taxation, 1942, Sec. 8.08; *Botchford v. Commissioner*, 1936, 9 Cir., 81 F (2) 914; *Poorman v. Commissioner*, 1942, 9 Cir., 131 F (2) 946; *Van Dusen v. Commissioner*, 1948, 9 Cir., 166 F (2) 647; and see the writer's opinion in *Dasteel v. Rogan*, 1941, D.C. Cal., 41 F. Supp. 836.)

The principles declared in these cases are a realistic approach to the problem. Through collective bargaining, the employee protects himself against sudden dismissal without cause, by requiring a definite notice. In the case before us, the minimum notice is one week. When the employer does not give the notice, either through voluntary choice or by force of circumstances, he is required to pay a week's wages. The wages are compensation for the week. The right to it is guaranteed in the contract. But the right to receive it is postponed to the time when the notice was due and was not given.

So the severance pay is not earned, as the Trustee argues, at the time the contract of employment is entered into, but at the time the week's notice is due. In effect, through the contract, the employer says to the employee, "If I discharge you without cause, I shall give you a week's notice. If I choose not to give you the notice, or circumstances, such as my going out of business, prevent me from giving it to you, I shall pay you the week's wages."

So the payments claimed here are for wages



earned for the week. And the Referee was wrong in denying them preferred status.

Hence the ruling above made.

Dated this 18th day of July, 1951.

/s/ LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed July 15, 1951.

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In the United States District Court, Southern  
District of California, Central Division

No. 50,151-Y

In the matter of  
ELLIOTT WHOLESALE GROCERY CO., a Cor-  
poration,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

The petition of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, to review the order of the Honorable David B. Head, Referee in Bankruptcy, dated May 17, 1951, denying priority for severance pay due to certain employees of the bankrupt having come on regularly for hearing before this Court on Monday, July 16, 1951, the petitioner appearing by Pauline Nightingale, Edward M. Belasco and Leon H. Berger, by Leon H. Berger, and the Trus-

tee in Bankruptcy, James M. McCloskey, appearing by Craig, Weller and Laugharn and C. E. H. McDonnell; and the cause having heretofore been heard, argued and submitted, the Court now makes its findings of fact, conclusions of law and order as follows:

### Findings of Fact

The findings of fact of the Referee are hereby adopted as the findings of fact of the Court, and the Court further finds as a fact that the Trustee has stipulated and agreed that petitioner's claims for severance pay be considered as claims for priority wages under section 64a (2) of the Bankruptcy Act as well as statutory lien claims under section 67b of the Bankruptcy Act.

### Conclusions of Law

#### I.

Petitioner's claims for severance pay constitute wages or salaries for personal services rendered within 90 days prior to the assignment for the benefit of creditors as provided for by section 1204 of the California Code of Civil Procedure and entitled to allowance in this bankruptcy proceeding as statutory liens under the provisions of section 67b of the Bankruptcy Act.

#### II.

Petitioner's claim for severance pay constitute wages which have been earned within three months before the date of the commencement of this bankruptcy proceeding and entitled to allowance as priority wages under the provisions of section 64a (2) of the Bankruptcy Act.

**Order**

It Is Hereby Ordered, Adjudged and Decreed that the order of the Referee, dated May 17, 1951, wherein the Referee allowed petitioner's claims for severance pay as general claims only, is hereby reversed and the Referee is directed to allow such claims for severance pay as priority claims for wages under sections 64a (2) of the Bankruptcy Act and as statutory lien claims under 67b of the Bankruptcy Act, such claims being more specifically as follows:

Alec W. Robinson.....	\$74.50
Leo P. Jensen.....	74.50
Ronald A. Grell.....	84.50
Elbert W. Whitney.....	70.50
James F. Bond.....	74.50
Mario Pezzati .....	68.50

Petitioner is allowed its costs upon this review.

Dated July 25, 1951.

/s/ LEON R. YANKWICH,  
Judge.

Approved as to Form:

CRAIG, WELLER &  
LAUGHARN,

By /s/ C. E. H. McDONNELL,  
Attorneys for Trustee.

[Endorsed]: Filed July 26, 1951.

Docketed and Entered August 10, 1951.

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTAL  
CERTIFICATE ON REVIEW

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

I, David B. Head, Referee in Bankruptcy, further certify the following documents which have been requested to be added to the Referee's Certificate filed herein on June 15, 1951:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.
4. Amended Proof of Wage Debt of William L. Jackson.

Dated November 21, 1951.

Respectfully submitted,

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Title of District Court and Cause.]

## ORDER APPROVING TRUSTEE'S BOND

At Santa Barbara, in said district, on the 18th day of Sept., 1950.

The above-named Elliott Wholesale Co., a Corp., having been duly adjudged a bankrupt on a petition filed by (or against) him on the .... day of ..... , 19..; and James M. McCloskey, of Santa Barbara, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., ..... dollars;

It Is Ordered that the said bond be, and it hereby is, approved.

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Endorsed]: Filed September 18, 1950, Referee.

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[Title of District Court and Cause.]

## STIPULATION

Whereas, on the 4th day of May, 1951, at the hour of 10:00 A.M. thereof there was a hearing on the Objection of James M. McCloskey, trustee in the above-captioned bankruptcy, to the claim of William L. Jackson, bearing Court number 151 in the amount of \$417.50, and



Whereas, there has heretofore been made and entered an Order of the above-captioned court allowing the claim of the said William L. Jackson in the amount and to the extent of \$67.50 as entitled to priority under C. C. P. 1204 and in the amount and to the extent of \$350.00 as a general unsecured claim, and

Whereas, it appears from the face of the said claim that the claim of William L. Jackson contains the sum of \$75.00 as "severance pay" alleged to be due the said William L. Jackson by reason of his dismissal without notice as required in the Union Contract between the union to which the said William L. Jackson belonged and the Elliott Wholesale Grocery Company, and

Whereas, the Court has heretofore made and entered its Findings of Fact and Conclusions of Law directed towards its rejection of "severance pay" in other claims in the within proceedings as prior, and

Whereas, through inadvertence the claim of William L. Jackson was not embodied in the said Findings of Fact and Conclusions of Law as aforesaid,

It Is Hereby Stipulated by and between the undersigned that the Trustee herein, James M. McCloskey, will hold separate and retain in his possession the sum of \$75.00 pending a final determination of whether or not "severance pay" is entitled to a prior position under the provisions of C. C. P. 1204, and

It Is Further Stipulated by and between the undersigned that in event of no review being taken

from the heretofore said Findings of Fact and Conclusions of Law and Orders in other claims for "severance pay" the trustee after the lapse of ten days from the date of the entrance of the said Order, and on the said Order becoming final without the filing of a petition for review, he will no longer be obligated to hold separate the sum of \$75.00 for the said William L. Jackson.

Dated May 11, 1951.

CRAIG, WELLER &  
LAUGHARN,

By /s/ C. E. H. McDONNELL,  
Attorneys for Trustee.

PAULINE NIGHTINGALE,  
EDWARD M. BELASCO, and  
LEON H. BERGER,

By /s/ LEON H. BERGER,  
Attorneys for William L.  
Jackson.

[Endorsed]: Filed May 17, 1951, Referee.

[Title of District Court and Cause.]

### PROOF OF WAGE DEBT

At San Luis Obispo, California, in said District of California, on the . . . . day of . . . . ., 1950, came William L. Jackson, of San Luis Obispo, County of San Luis Obispo, in said District of California, and made oath, and says that Elliott Wholesale Co., a Corporation, the person by (against) whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filings of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four Hundred Seventeen and 50/100ths Dollars (\$417.50); that the consideration of said debt is as follows: Wages earned as a route salesman, the particular kind of work done being route selling of goods work, between the dates of . . . . ., 1948, to May 30th, 1950, both dates inclusive, being one week severance pay at the rate of \$75.00 per week, plus 3 weeks vacation pay or \$225.00 plus 7/12ths of a year vacation pay of \$87.50 plus 2 days salary or \$30.00, total \$417.50 based upon Union Contract, that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been

received for such account, nor any judgment rendered thereon.

/s/ WILLIAM L. JACKSON,  
Creditor.

William L. Jackson,  
673 Santa Rosa Street,  
San Luis Obispo, California.

Social Security No. 066-01-9894.  
No. of Withholding .....  
Tax Exemptions Claimed .....

Subscribed and sworn to before me this 11th day  
of December, 1950.

[Seal]                      A. E. MALLAGH,  
County Clerk,

By /s/ MARGARET MUZIO,  
Deputy Clerk.

Assignment of Claim to State Labor Commisisoner

I hereby assign my claim, as described in this document, to the Labor Commissioner of the State of California, and authorize him to take such steps as he shall deem necessary to collect same, including attendance at all meetings of creditors, as my representative.

I authorize him to receive all payments, and direct that any and all notices may be forwarded to him.

Dated the 11th day of December, 1950.

/s/ WILLIAM L. JACKSON.

Acknowledged before me this 11th day of December, 1950.

[Seal]            A. E. MALLAGH,  
County Clerk,

By /s/ MARGARET MUZIO,  
Deputy Clerk.

[Endorsed]: Filed December 13, 1950, Referee.

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[Title of District Court and Cause.]

AMENDED PROOF OF WAGE DEBT

To Claim Statutory Lien.....\$161.25  
And General Claim.....\$256.25

At San Luis Obispo, California, in said District of California, on the 25th day of April, 1951, came William L. Jackson, of San Luis Obispo, County of San Luis Obispo, in said District of California, and made oath, and says that this amended claim is being filed in the place and stead of the claim filed by affiant in this proceeding on December 13th, 1950; that Elliott Wholesale Co., a Corporation, the Corporation against whom a petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the sum of Four Hundred Seventeen and 50/100ths Dollars (\$417.50); that the consideration of said debt is as follows: Wages earned as a Route Salesman, the



particular kind of work done being route selling of goods work, between the dates of March 2nd, 1950, to June 1st, 1950, both dates inclusive, being one week severance pay at the rate of \$75.00 per week, plus 3 weeks vacation pay or \$225.00, plus 7/12ths of year vacation pay of \$87.50 plus 2 days salary or \$30.00, total \$417.50, based upon Union Contract, that no part or said debt has been paid; that there are no setoffs or counterclaims to the same; and that deponent has not, nor has any person by his order, or to his knowledge or belief for his use, had or received any manner of security for said debt whatever.

And deponent further says that no note has been received for such account, nor any judgment rendered thereon.

That \$161.25 of the claim of affiant is a claim for labor incurred within ninety (90) days prior to said assignment for the benefit of creditors; that under Section 1204 of the California Code of Civil Procedure said claim is a preferred claim and lien and must be paid by the assignee for the benefit of creditors as soon as the money with which to pay the same becomes available; that said assignee had charge of the assets of said bankrupt prior to the filing of the petition in bankruptcy herein, out of which funds said affiant was entitled to be paid.

Deponent claims a statutory lien upon said property and funds passed, or to be passed, to the Trustee herein, under the laws of the State of California

and of the United States, for the claim of said deponent in said sum of \$161.25.

/s/ WILLIAM L. JACKSON,  
Creditor.

673 Santa Rosa St.,  
San Luis Obispo, Calif.

Social Security No. 066-01-9894.

Number of Withholding Tax Exemptions Claimed, 4.

Subscribed and sworn to before me this 25th day  
of April, 1951.

[Seal]                      A. E. MALLAGH,  
County Clerk.

/s/ MARGARET MUZIO,  
Deputy Clerk.

Received April 27, 1951.

[Endorsed]: Filed July 21, 1951.

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[Title of District Court and Cause.]

### ORDER TO AUGMENT RECORD

It appearing that on November 21, 1951, the Honorable David B. Head, Referee in Bankruptcy, filed his "Referee's Supplemental Certificate on Review," adding to his certificate filed June 15, 1951, the following documents:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.

4. Amended Proof of Wage Debt of William L. Jackson, which documents were not a portion of the original Referee's Certificate on Review; and

It further appearing that the hereinbefore described documents are necessary to complete the record on Appeal #13102, entitled James M. McCloskey, Trustee, etc., vs. Division of Labor Law Enforcement, State of California, presently pending before the United States Court of Appeals for the Ninth Circuit.

Now, Therefore,

It Is Ordered that the record herein be and the same hereby is augmented by the inclusion of the following described documents:

1. Order Approving Trustee's Bond.
2. Stipulation dated May 17, 1951.
3. Proof of Wage Debt of William L. Jackson.
4. Amended Proof of Wage Debt of William L. Jackson.

Dated November 30, 1951.

/s/ LEON R. YANKWICH,  
Judge U. S. Dist. Court.

[Endorsed]: Filed November 30, 1951.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages contain the original Involuntary Petition in Bankruptcy; Order of General Reference; Adjudication of Bankruptcy; Referee's Certificate on Review and Objections of Trustee to Claim of the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Original claim filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Amended Claim filed by the Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Findings of Fact, and Conclusions of Law, Order on Trustee's Objection to the claims of Division of Labor Law Enforcement, Department of Industrial Relations, State of California, and Petition for Review certified therewith; Referee's Supplemental Certificate on Review with Order Approving Trustee's Bond, Stipulation dated May 17, 1951, Proof of Wage Debt of William L. Jackson and Amended Proof of Wage Debt of William L. Jackson certified therewith; Memorandum Decision; Findings of Fact, Conclusions of Law and Order; Appellant's Designation of the Record on Appeal; Affidavit of Service and Order to Augment Record which is the record which has been designated on the petition of the trustee for appeal to

the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 4th day of December, A.D. 1951.

[Seal]                      EDMUND L. SMITH,  
Clerk,

By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 13102. United States Court of Appeals, for the Ninth Circuit. James M. McCloskey, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company, a Corporation, Bankrupt, Appellant, vs. Division of Labor Law Enforcement, Department of Industrial Relations, State of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 5, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



United States Court of Appeals  
for the Ninth Circuit

No. 13,102

JAMES M. McCLOSKEY, Trustee in Bankruptcy  
for Elliott Wholesale Grocery Company, a Corporation,

Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT,  
Department of Industrial Relations, State of  
California,

Appellee.

APPELLANT'S STATEMENT OF POINTS  
TO BE RELIED UPON ON APPEAL

To Division of Labor Law Enforcement, Department of Industrial Relations, State of California, and Pauline Nightingale, Edward M. Belasco and Leon H. Berger, Its Attorneys:

You, and Each of You, will Please Take Notice that under the provisions of Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, that the Appellant intends to rely upon the following points in its appeal in the above-entitled cause:

1. The District Court erred in its Order of July 26, 1951, in reversing the Order of the Referee in Bankruptcy dated May 17, 1951.

2. The District Court erred in its Order of July 26, 1951, in directing the Referee in Bankruptcy to allow the claims of Alec W. Robinson, Leo P.

Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as wage claims entitled to priority under the provisions of Section 64a (2) of the Bankruptcy Act.

3. The District Court erred in its Order of July 26, 1951, in directing the Referee to allow the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as statutory lien claims under the provisions of Section 1204 of the California Code of Civil Procedure and Section 67b of the Bankruptcy Act.

4. The District Court erred in its Order of July 26, 1951, in failing to affirm the Referee in his Order of May 17, 1951, allowing the claims of Alec W. Robinson, Leo P. Jensen, Ronald A. Grell, Elbert W. Whitney, James F. Bond and Mario Pezzati for severance pay as general unsecured claims only.

Dated December 13, 1951.

FRANK C. WELLER,  
HUBERT F. LAUGHARN,  
THOMAS S. TOBIN,  
C. E. H. McDONNELL,

By /s/ C. E. H. McDONNELL,  
Attorneys for Appellant James M. McCloskey,  
Trustee in Bankruptcy for Elliott Wholesale  
Grocery Co.

Affidavit of service by mail attached.

[Endorsed]: Filed December 17, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF  
RECORD BELIEVED NECESSARY FOR  
CONSIDERATION ON APPEAL AND TO  
BE PRINTED

Pursuant to Rule 19 (6) of this Court, appellatant designates those parts of the record which it thinks necessary for the consideration of the points listed in its statement of points upon which it intends to rely on this appeal from the Order of the District Court filed in the above-entitled proceedings on July 26, 1951, and the portions thereof which it desires to have printed (in each instance omitting the title of court and cause, unless otherwise stated), to wit: the entire record as designated by the Clerk of the District Court to be printed.

Dated December 13, 1951.

FRANK C. WELLER,  
HUBERT F. LAUGHARN,  
THOMAS S. TOBIN,  
C. E. H. McDONNELL,

By /s/ C. E. H. McDONNELL,  
Attorneys for Appellant James M. McCloskey,  
Trustee in Bankruptcy for Elliott Wholesale  
Grocery Co., a Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed December 17, 1951.

United States Circuit Court of Appeals  
for the Ninth Circuit

Excerpt from Proceedings of Monday, September 19, 1951.

Before: Healy, Bone and Orr,  
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING PETITION  
AND ALLOWING APPEAL

Ordered petition of James M. McCloskey, as Trustee in Bankruptcy for the Estate of Elliott Wholesale Grocery Company for allowance of appeal herein under section 24(b) of the Bankruptcy Act from the order entered on August 10, 1951, in the District Court for the Southern District of California granted, and an appeal from said order be, and hereby is, allowed.

